IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 308

In Bankruptcy.

STATE OF MISSOURI BY AND THROUGH THE UNEMPLOYMENT COMPENSATION COMMISSION AND HARRY P. DRISLER, TREASURER, *Petitioner and Appellant below,*

vs.

WARREN S. BARHART, TRUSTEE IN BANKRUPTCY FOR [illegible] INC., *Respondent and Appellee below.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORTING THEREOF.

HARRY G. WALTHER, JR.,
Chief Counsel,

VIVA HUNT,
Assistant Counsel,
For Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows to this Honorable Court:

I.

Summary and Statement of the Matter Involved.

1. That your petitioner is aggrieved by the final opinion and decision of the United States Circuit Court of Appeals for the Eighth Circuit, entered on the 2nd day of May, 1940, in the cause entitled State of Missouri, By and Through the Unemployment Compensation Commission and Harry P. Drisler, Appellants, vs. Warren S. Earhart, Trustee in Bankruptcy for Burnap-Meyer, Inc., Appellee.

2. The important questions before that Court, which were decdied adversely to the contention of the petitioner were:

a. Can the trustee for Burnap-Meyer, Inc., which filed a petition for corporate reorganization in December 1936 and operated under owner-management from December 13, 1936, until April 14, 1938, and which was liable both for taxes under Title IX of the Federal Social Security Act for the years 1936, 1937 and 1938 and for contributions under the Missouri Unemployment Compensation Law for the years 1937 and 1938, be heard to claim that contributions based upon wages payable for the period beginning January 1, 1937 and ending June 16, 1937 are not due, on the ground that the Missouri Unemployment Compensation Law, which was approved June 17, 1937, is unconstitutional in that it violates Article II, Section 15 of the Missouri Constitution prohibiting the General Assembly from passing a law retrospective in its operation, when Section 902 (a) (3) of the Social Security Act, quoted at p. 15, provides for the allowance of credit against the federal tax up to 90% for the amount of contributions paid into an unemployment fund under an approved state law and when, if the company discharges its duty and complies with Federal and State laws, the tax obligation will not be increased?

b. Should effect be given to Section 6 (C) (d) of the Missouri Unemployment Compensation Law which specifically levies a tax in addition to any other tax levied by the Act so that the actual tax payment due Missouri for any part of a given year must equal 90% of the tax levied under Title IX of the Federal Social Security Act?

c. Should the Court have ordered the trustee to pay contributions due under the Missouri Unemployment Compensation Law in view of the fact that Section 124a, Title 28, U. S. C. A. (quoted at p. 16) provides that a trustee shall be subject to all state and local taxes applicable to a business the same as if the business were conducted by an individual or corporation?

d. Should the Court order the payment of interest on delinquent contributions as provided in the Unemployment Compensation Law when the contributions accrue during the time the company is in the process of reorganization and the business is being operated under the supervision of the Federal Court?

e. Are contributions, which are due under the Missouri Unemployment Compensation Law, taxes within the meaning of the Bankruptcy Act?

3. The facts which gave rise to the foregoing questions were these:

An involuntary petition in bankruptcy was filed against Burnap-Meyer, Inc., in the United States District Court for the Western Division of the Western District of Missouri on November 12, 1936. Answer and petition of the Company for reorganization under Section 77B of the Bankruptcy Act was filed and approved December 13, 1936. Owner-management was granted debtor, which continued until April 14, 1938, when a temporary trustee was appointed (Tr. 1-2).

On May 23, 1938, a final order of liquidation was entered, the property was ordered sold, and the case was referred to the Referee. The amount realized from the sale of the property is insufficient to pay the claims which arose during the period of owner-management and which were all allowed as administrative expenses (Tr. 2).

The Federal Social Security Law was passed August 14, 1935. Burnap-Meyer, Inc. was liable under the Federal Act for taxes based upon wages payable to its employees for the years 1936, 1937 and 1938. Under the provisions of Title IX of the Federal Act, an employer was entitled to credit against the federal tax, up to 90% thereof, the taxes which he paid to a state fund under an approved state unemployment Compensation law, provided state contributions were paid before the time set out for the filing of the Federal return (Tr. 4; Federal Social Security Act, Section 902, quoted at page 15).

Missouri had no unemployment compensation law during the year 1936. Therefore, Burnap-Meyer, Inc. became indebted to the Federal Government for the entire amount of the tax levied under Title IX of the Federal Act for that year. On June 17, 1937, the Missouri Unemployment Compensation Law was enacted (Laws of Missouri, 1937, pp. 574-603). This Law was approved by the Social Security Board on July 13, 1937. By its terms on and after January 1, 1937, contributions were to accrue and become payable by each employer for each calendar year in which he was subject to the Act with respect to wages payable for employment occurring during such calendar year (Section 6 A (1), Unemployment Compensation Law, quoted at page 16). Burnap-

Meyer, Inc. became liable for contributions with respect to wages payable for employment during the year 1937. Burnap-Meyer, Inc. knew that, if it paid contributions due under the State Law prior to January 31, 1938, said contributions could be credited against the Federal tax and that its tax obligation would not be increased. (Social Security Act, Section 902, quoted at p. 15.)

Burnap-Meyer, Inc. did not pay any contributions which became due under the Missouri Unemployment Compensation Law. It did not pay any taxes which became due under Title IX of the Federal Act for the year 1937.

On June 13, 1938, the petitioner filed a claim against the bankrupt estate for contributions accruing under the Act for the period from January 1, 1937 to April 14, 1938, in the amount of $1,559.26, with interest at 1% per month on payments from their due dates under the Act (Tr. 3, Ex. A, Tr. 7-10). The claim was computed upon wages payable for the entire year 1937 at the rate of 1.8%, the rate required for the year 1937, and from January 1, 1938 until April 14, 1938 at the rate of 2.7%, the rate required for the year 1938. (Laws of Missouri, 1937, p. 585.) Contributions claimed for the year 1937 amounted to $1,123.03; those for the year 1938 amounted to $436.23 (Tr. 4).

On May 12, 1938, Dan M. Nee, Collector of Internal Revenue, filed a claim for taxes due the United States in the amount of $397.20, $272.48 being for taxes due under Title VIII of the Federal Social Security Act and $124.78 being for taxes due under Title IX (Tr. 4, Ex. D, Tr. 15-16). $124.78 is the exact amount which should have been paid to the Federal Government under Title IX *if* contributions required under the Missouri Law had been paid and *if* credit had been received. $124.78 is the 10% of $1,247.81 which the Federal Government should have claimed and which the Referee should have allowed. The $1,123.03 claimed by the petitioner for the year 1937 is the 90% of the Federal tax for which Burnap-Meyer would have been allowed credit against the Federal tax if it had been paid when due. On October 27, 1938, the Collector of Internal Revenue filed an amended claim, in which he asked for taxes under Title IX in the amount of $1,247.81, or 100% rather than 10% of the tax required (Tr. 4, Ex. G. Tr. 19-21).

Two other claims were filed by the Collector of Internal Revenue, one in the amount of $34.75 for taxes due under Title VIII for the second quarter of the year 1938 (Tr. 4, Ex. E, Tr. 16-17); the other in the amount of $107.12, $54.30 being for taxes due under Title IX for the year 1938 and $52.82 being for taxes due under Title VIII for the second quarter of the year 1938 (Tr. 4, Ex. F, Tr. 18-19). No one has been able to explain why the Federal Government claimed only $54.30 under Title IX for the year 1938. Perhaps this too was only 10% of the amount which should have been claimed.

Interest was also claimed on the amounts set out in these claims.

The claims filed for taxes under Title VIII have no bearing on this case except the part they may play in helping the court to determine just why the Referee, on February 28, 1939, made an order allowing all of these four claims, which total $2,059.42 in the sum of only $564.58 (Tr. 4, Ex. H., Tr. 21). All amounts claimed under Title VIII, plus the $54.30 (Ex. F, Tr. 18-19), claimed for the year 1938 under Title IX plus 10% of the amount claimed under Title IX in the amended claim (Ex. G, Tr. 19-21) would total $539.13. The petitioner presumes that the amount allowed was calculated in this manner and that the difference between $539.13 and $564.58 was interest. At any rate, taxes were claimed under Title IX for the year 1937 in the amount of $1,247.81. Only $564.58 was paid under both Titles VIII and IX for both years 1937 and 1938. It is evident that the Court allowed the tax as if credit had been granted for contributions paid under the Missouri Unemployment Compensation Law. The Federal Government did not appeal (Tr. 5), presumably because it felt that contributions would be paid under the State law and credit would be extended or perhaps because it felt it could collect the 90% later if the State tax was not paid.

The trustee filed objections to the claim of the petitioner claiming that (1) contributions payable under the Missouri Unemployment Compensation Law are not taxes within the meaning of Section 64 A. (4) of the Chandler Act; (2) that they are not considered as taxes by the State of Missouri; (3) that contributions accruing on wages payable for the period prior to June 17, 1937 should not be allowed; (4) that the petitioner's claim should not be given priority over other

administrative expenses; (5) that the claim should not be allowed in any sum (Tr. 5, Ex. C, Tr. 11-15).

Hearing was held before the Referee on the trustee's objections (Tr. 5). The petitioner contended that contributions exacted under the Missouri Unemployment Compensation Law are taxes and are entitled to the priority allowed to taxes under the bankruptcy act; and that, since the Federal Government would compel the trustee to pay the full 100% of the tax due under Title IX to the Collector of Internal Revenue if 90% were not paid to the State of Missouri, the trustee was not injured in that the amount of the tax which he would necessarily have to pay would not be increased and therefore was not in a position to claim that the Missouri Law was retrospective in operation and therefore unconstitutional.

The Referee ignored the fact that he had ordered only 10% of the amount due under Title IX to be paid and held that, since the Missouri Law was not approved until June 17, 1937, the petitioner is not entitled to claim or recover for any contributions alleged to be due it covering any period prior to that date (Tr. 5, Ex. I, Tr. 21-23). By his order of February 28, 1939 (Ex. H, Tr. 21), the Referee failed to allow the Federal Government more than 10% of the tax due for the year 1937. By his order in respect to the petitioner's claim, he failed to order the payment of any taxes to the State of Missouri for the period beginning January 1, 1937 and ending June 16, 1937. In other words the Referee exempted the bankrupt from the payment of 90% of the amount of taxes it should have paid for this period.

The Referee held that such contributions as may be allowed under the Unemployment Compensation Law do not constitute a tax and refused to allow them as such. The order further found that (1) it is practicable to determine the estate's liability under the Chandler Act, which fact the petitioner has never questioned, (2) that contributions accruing from June 17, 1937 to December 31, 1937 in the amount of $592.94 and from January 1, 1938 until April 14, 1938 in the sum of $436.23, making a total of $1,029.17, should be paid; and that this amount should be paid as an administrative expense on a parity with all other claims arising during the period of owner-management. No interest was allowed.

A petition for review was filed; the court affirmed the order of the Referee (Tr. 6, Ex. J, Ex. K, Tr. 24-27); and the peti-

tioner appealed to the United States Circuit Court of Appeals, Eighth Circuit (Tr. 6, Ex. L, Tr. 27-28).

Upon its petition for review and in its assignment of errors (Tr. 6, Ex. M, Tr. 28-29), in addition to the above mentioned arguments made before the Referee, the petitioner further contended (1) that interest should have been allowed and (2) that, if the Court should find that contributions based upon wages payable for the year 1937 prior to June 17, should not be paid, that effect should be given to Section 6 (C) (d) (Appendix p. 40), which specifically levies a tax in addition to any other tax levied by the Act so that the actual payment due Missouri must equal 90% of the tax levied under Title IX of the Federal Social Security Act.

On August 10, 1939, the Social Security Act was amended, which fact, the petitioner maintains strengthened its contention that the bankrupt's tax burden would not be increased by paying contributions to the State of Missouri based upon wages payable for the entire year 1937, and, therefore, the trustee cannot be heard to say he is injured and that the Missouri Law is unconstitutional. The original Social Security Act provided for credit if contributions were paid to a state prior to the date for filing the return under Title IX (Section 902, Social Security Act, quoted at page 15). Conflicting decisions were being handed down by various federal district courts, some courts holding that bankrupts which were not able to pay the State tax when due should not be given the benefit of the credit allowance, and, therefore, the entire amount of taxes claimed both by the Federal Government and the State would have to be paid, other courts holding that if credit were not allowed, the 90% credit which would normally be allowed amounted to a penalty, which was prohibited by the Bankruptcy Act, and, therefore, could not be collected by the Federal Government. Congress, realizing that credit should be allowed, amended Section 902 to provide for the allowance of credit for the years 1936, 1937 and 1938 for the amount of contributions paid into an unemployment fund under a State law *regardless of the date of payment* provided the assets of the taxpayer were under the control of the Court at any time during the fifty-nine-day period following the enactment (Section 902 (a) (3), quoted at page 15). The assets of Burnap-Meyer, Inc. were under the control of the Court during that

period. Therefore, the allowance of credit is assured regardless of the time of payment to the State.

Not only the Referee and the District Court, but also the United States Circuit Court of Appeals, Eighth Circuit, ignored the fact that taxes should be paid either to the Federal Government or the State of Missouri and the fact that the decision of the lower court had exempted the bankrupt from taxation and made the following findings to which the petitioner takes exception: (1) that the collection of contributions for the period prior to the approval of the law is forbidden by Article II, Section 15 of the Missouri Constitution prohibiting the General Assembly to pass laws retrospective in operation; (2) that the Federal Government did not file an appeal and therefore cannot collect the additional 90% of its tax claim even though that amount is never paid to the State, and, therefore, that the estate is injured and is in a position to raise the constitutional question; (3) that Section 6 (C) (d) is subject to the same constitutional objections; (4) that after property passes into the hands of the Court, interest on claims is not allowable against the estate where the assets are inadequate to pay the amount of the claims allowed as costs of administration; (5) that it is unnecessary in this case to determine whether or not contributions are taxes. Contributions which became due after June 17, 1938 were allowed as an administrative expense (Tr. 32-40).

The petitioner was aggrieved by this decision and filed its petition for rehearing (Tr. 41-48). The same was denied on May 24, 1940 (Tr. 49).

On motion of petitioner, an order was made on June 6, 1940 staying the issuance of the mandate for a period of 30 days to permit petitioner to apply for this writ (Tr. 50). On July 2nd, an order was made further staying the issuance of the mandate for an additional thirty days.

II.

Reasons Relied on for the Allowance of the Writ.

1. The United States Circuit Court of Appeals in holding that taxes are due neither to the Federal Government under Title IX of the Social Security Act nor to the State of Missouri under the Unemployment Compensation Law, in exempting the bankrupt from taxation and in sanctioning an erroneous

order of a lower court has destroyed the unitary plan for unemployment relief which Congress visualized when it passed the Social Security Act and invited the states to tax the same classes of employers and has so far departed from the accepted and usual course of judicial proceedings in respect to social security legislation as to call for an exercise of this court's power of supervision.

2. The United States Circuit Court of Appeals by its decision, has authorized the trustee to ignore Section 124a, Title 28, U. S. C. A., which said statute should be construed by this court as it applies to Unemployment Compensation contributions in order that a general principle may be established which may be followed by all courts in handling estates.

3. The United States Circuit Court of Appeals in holding that the Missouri Unemployment Compensation Law, which is a coordinated part of a great national network of social security legislation made up from both Federal and State laws and which was passed at the invitation of Congress, is unconstitutional and in refusing to give effect to Section 6 (C) (d) handed down an erroneous and unpredicted decision based upon an alleged hardship in one particular, unexpected and peculiar situation brought about by an erroneous order of a referee, and has ignored the fact that in the general line of cases the State and Federal laws operate together and no hardship results. In handing down this decision the Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court.

4. The Court in refusing to decide whether or not contributions exacted under the Missouri Unemployment Compensation Law are taxes, which question was raised by the trustee's objections and was passed upon by the Referee and the District Court, merely because a determination of this question is not necessary in the instant case for the allowance of the principal amount of the claim since all contributions accrued during owner-management and therefore fall under the classification of administrative expenses, has, in effect, sanctioned the decision of the lower court that said contributions are not taxes and has left to the lower courts the authority to order the payment of all claims for contributions accruing prior to the date of bankruptcy which may arise in the

future or which are now pending to be paid as general claims instead of tax claims, therefore depriving them of their priority under the Bankruptcy Act. The question as to whether or not contributions exacted by the Missouri Law should be given the priority allowed to taxes under the Bankruptcy Act has not been, but should be, settled by this Court.

5. In failing to allow interest, the Court has decided a federal question in a way in conflict with applicable decisions of this Court.

6. In refusing to pass upon the question of whether or not contributions are taxes, the Circuit Court of Appeals has indicated its approval of a decision of a lower court which is probably in conflict with applicable local decisions.

7. The Circuit Court of Appeals, in holding that contributions cannot be collected for the period beginning January 1, 1937 and ending June 17, 1937 has paved the way for all employers liable for that period to demand a refund of contributions paid. It is imperative that the Unemployment Compensation Commission of Missouri have a ruling from the court of highest authority before acting on such applications for refund.

III.

Prayer for Writ.

Wherefore, your petitioner prays that a Writ of Certiorari be issued under seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of State of Missouri By and Through the Unemployment Compensation Commission and Harry P. Drisler, Treasurer, Appellants vs. Warren S. Earhart, Trustee in Bankruptcy for Burnap-Meyer, Inc., Appellee, No. 11596, to the end that this cause may be reviewed and determined

by this Court as provided for in the statutes of the United States; and that the findings of said Circuit Court, to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

HARRY G. WALTNER, JR.,
Chief Counsel,

VIVA HUNT,
Assistant Counsel,
For Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

NO.....

STATE OF MISSOURI BY AND THROUGH THE UNEMPLOYMENT COMPENSATION COMMISSION AND HARRY P. DRISLER, TREASURER, *Petitioner and Appellant below,*

vs.

WARREN S. EARHART, TRUSTEE IN BANKRUPTCY FOR BURNAP-MEYER, INC., *Respondent and Appellee below.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed on the 2nd day of May, 1940, and is to be found at page 32 et seq. of the transcript. Said opinion has not been officially reported.

II.

Grounds on Which Jurisdiction is Invoked.

The date of the judgment to be reviewed is May 2, 1940 (Tr. 32). A petition for a rehearing, filed by this petitioner in the United States Circuit Court of Appeals, was by said Court denied on May 24, 1940 (Tr. 49).

This petition for review on writ of certiorari is made upon authority of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347) (Appendix p. 38).

Since this Court's jurisdiction is dependent upon the discretion of the Court and not upon the nature of the claims

advanced and the rulings made thereon, the facts showing the reasons why this court should exercise its supervisory powers are not summarized under this heading. The petitioner believes however that there are special and important reasons why this writ should be granted. These have already been stated in the preceding petition under II (pp. 8 to 10), and are discussed under the headings of "Statement of the Case" and "Argument."

Inasmuch as the foregoing statute clearly confers on this Court jurisdiction to review by certiorari the opinion of a circuit court of appeals in any case civil and criminal, it appears unnecessary to brief this question. The following case is believed to sustain said jurisdiction.

Magnum Import Company vs. *Coty* (N. Y. 1923), 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 3 to 8), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Court erred in holding that contributions in the amount of $530.09 held to be due for the period beginning January 1, 1937, and ending June 16, 1937, could not be collected by petitioner and in holding that the appellee was injured and was in a position to raise a constitutional question.

2. The Court erred in failing to give effect to Section 6 (C) (d) of the Missouri Unemployment Compensation Law.

3. The Court erred in failing to order the payment of interest from the dates upon which contributions became due to date of payment.

4. The Court erred in refusing to determine whether or not contributions exacted under the Missouri Unemployment Compensation Law are taxes within the meaning of the Bankruptcy Act and required to priority because of Section 124a, 28 U. S. C. A.

V.

Summary of Argument.

1.

The judgment of the lower Court holding Respondent Appellee not liable to pay contributions claimed is erroneous because (a) The Missouri Unemployment Compensation Law does not levy a retroactive tax contrary to the Missouri Constitution because the application of that law to employers liable to the tax on employers of eight or more under Title IX of the Social Security Act does not increase the tax liability of such taypayers. (b) The Missouri Unemployment Compensation Law is to be construed prospectively and so construed levies a tax for any part of the year 1937, the amount of which is computed at 1.8% of the 1937 payroll. (c) The general application of the Missouri Unemployment Compensation Law does not under any construction bring about the general collection of a retroactive tax. All taxpayers of the class to which Respondent Appellee belongs are liable for the payment of a 2% tax on their 1937 payroll to the Federal Government under a law permitting such taxpayers to credit their State tax payment of 1.8% of their 1937 payroll against the Federal tax. This is the general operation and construction of the two taxing laws. Merely because of the unusual situation of this particular taxpayer (resulting from the erroneous order of the Referee) this court on a basis of prior decisions will not hold the Missouri Law unconstitutional as being retrospective in operation. (d) Because if the allowance of Petitioner Appellant's claim could by any construction be construed to increase the tax liability of the Respondent Appellee, such result has been brought about solely by the failure and refusal of the Respondent Appellee to obey the specific mandate of Section 124a, Title 28, U. S. C. A.

2.

Contributions claimed are properly due under Section 6 (C) (d) of the Missouri Unemployment Compensation Law which levies a tax on all employers of the class to which Respondent Appellee belongs, equal to 90% of the tax levied under appropriate Federal Tax Law and against which the state tax is credited.

3.

The lower Court erred in denying Petitioner Appellant's claim for interest upon the contributions or taxes due because ruling decisions of this court specifically require the payment of interest on tax obligations. This is especially true or should be especially true in the case of tax obligations which accrue while the business is being operated under the supervision of the Federal Court and it is immaterial that there are insufficient funds to pay administrative expenses in full.

4.

The lower court erred in failing to determine that petitioner's claim was for a tax because it is an involuntary exaction collected for a public purpose by the sovereign power; it is immaterial that procedure for its collection might be different from that provided for other taxes or that it might be identified by the term "contributions," and being a tax, interest should have been allowed and it should have been ordered paid as an administrative expense entitled to priority over other administrative expenses for the reason that Section 124a, Title 28, U. S. C. A. specifically directs the Respondent Appellee to pay these contributions or taxes as an individual or corporation.

VI.

Argument.

1.

The Court erred in denying that contributions are due for the year 1937 prior to June 17, 1937, the day the law was approved and in holding that the appellee was injured and was in a position to raise a constitutional question.

In July 1935, the Federal Social Security Law was passed. Section 901, 42 U. S. C. A. 1101, reads as follows:

> "On and after January 1, 1936, every employer * * * shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages * * * payable by him * * * with respect to employment * * * during such calendar year:
>
> "(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

"(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

"(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum."

Credit was allowed against the Federal tax for taxes paid to states having approved unemployment compensation laws. (Soc. Sec. Act, Section 903 (a), Appendix p. 39.) Section 902, 42 U. S. C. A. 1102, provided for this credit:

"The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credits allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903."

Section 903 (a), 42 U. S. C. A. Sec. 1103 (quoted in appendix at p. 39), sets out the requirements which state laws must meet to obtain approval of the Federal Social Security Board.

In 1939, Section 902 (a) (3), 42 U. S. C. A. 1102, note, was amended to read as follows:

"(a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

"(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction."

On June 17, 1937, the Missouri Unemployment Compensation Law was approved by the Governor and became law. This law met the requirements and was approved by the Board on July 13, 1937.

Section 6 (A) (1) of the Missouri Law, Laws of Missouri, 1937, p. 585, reads in part as follows:

> "On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act, with respect to wages payable for employment (as defined in Section 3 (i)) occurring during such calendar year. * * * "

Burnap-Meyer, Inc. was an employer within the meaning of Title IX of the Federal Social Security Act and became liable for taxes for the years 1936, 1937 and 1938. It was required to pay the entire amount of the tax based upon wages payable to Missouri employees during the year 1936 to the Federal Government because Missouri had no unemployment compensation law and there were no contributions to credit against the Federal tax. In 1937 it became liable under the Missouri Unemployment Compensation Law.

A Federal statute, Section 124a, Title 28, U. S. C. A. (Act of June 18, 1934), which reads:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States Court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. * * * "

required the bankrupt operating under owner-management or its trustee to pay State and local taxes.

The United States Circuit Court of Appeals held that contributions in the amount of $530.09, based upon wages payable during the year 1937 prior to June 17, 1937, the date of the approval of the Act, could not be collected, because the law insofar as it exacts a tax for this period is unconstitutional.

The Court based this finding on Article II, Section 15 of the Missouri Constitution, which reads:

> "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

It cited the case of *Smith* vs. *Dirckx*, 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510, in support of this finding. The facts in the Dirckx case are not the facts in the Burnap-Meyer Inc. case, and, therefore, the decision in the Dirckx case is not controlling here. In the Dirckx case, the statute in question which became effective in May, 1919, imposed a new obligation in that the rate of the tax was to be increased from one-half of one per cent to 1½ per cent and therefore the court held that the higher rate could not be applied to income received during that portion of 1919, prior to May. It is important to note, however, that the Court permitted the tax to be collected for this period at the rate of one-half of one per cent, as imposed by the old law, even though the old law had been repealed. The Court permitted the old obligation to stand. Would not the same Court permit the old obligation to stand in the Burnap-Meyer case? No new obligation is created if the trustee performs his duties properly and complies with State and Federal laws.

The Circuit Court of Appeals also cited the cases of *State ex rel. Koeln* vs. *Southwestern Bell Telephone Co.*, 316 Mo. 1008, 292 S. W. 1037, and *Graham Paper Co.* vs. *Gehner*, 332 Mo. 155, 59 S. W. (2d) 49. These cases also dealt with income taxes.

Here, however, we are concerned with a tax of an entirely different character. As was said in *United States* vs. *Glenn L. Martin Co.*, 60 S. Ct. 32, 33; 84 L. Ed. 51:

> "But the Social Security Act imposes upon every employer 'an excise tax, with respect to having individuals in his employ.' And employment in that act 'means any service, of whatever nature, performed within the United States by an employee for an employer * *' with exceptions not material here. This excise has been represented as one levied 'upon the relation of employment,' and upon 'the right to employ' and as a payroll tax. It is

> not—as taxes upon the privilege of selling, manufacturing or processing characteristically are—measured by the value of the privilege taxed, or by either quantity or price of what is manufactured, processed or sold. A tax on the processing or sale of an article, while an excise, commonly would be denoted a tax 'on' the article processed or sold. * * * And a tax 'on' the relationship of employer-employee—characterized as a tax on payrolls—is not of the type treated by the contract as a tax 'on' the goods or articles sold."

In the instant case, no question of retroactivity is involved. The Legislature apparently intended for the Act to have an entirely prospective effect. This intention is found in Section 6 (C) (d) (Appendix, p. 40) which imposes additional contributions not with respect to any particular wages paid but rather with respect to contributions not otherwise payable under the Act. So construed, the law levies a tax for that part of the year 1937 remaining after its effective date and its only relation to a time antecedent is to use the amount of wages payable during the first part of 1937 as a basis upon which to compute the tax. *Cooley on Taxation* (4th Ed.) Sec. 523, p. 1157, discusses retrospective taxation as follows:

> "In apportioning the tax between individuals there is no valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one's business for the preceding year instead of upon an estimate of the business for the year to come."

A view similar to that of Mr. Cooley has been expressed by Courts of states which have constitutional inhibitions against retrospective legislation. *Carroll* vs. *Wright*, 131 Ga. 728, 63 S. E. 260; *Page* vs. *Samson*, 184 Ga. 623, 192 S. E. 203; *Cadena et al.* vs. *State ex rel. Leslie, et al.* (Tex. Civ. App.), 185 S. W. 367; *American Refrigerator Transit Co.* vs. *Adams*, 28 Colo. 119, 63 Pac. 410; *McClellan* vs. *Railway Co.*, 11 Lea (Tenn.) 336.

People vs. *Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383, involved a statute which was passed in June, 1880, providing that a tax should be imposed upon certain corporations and

payable on January 1, 1881. The statute further provided that on November 1 of 1880 all such corporations should file a return, stating therein the amount of the dividends declared by such corporations during the year immediately preceding November 1, 1880, and that a tax based upon the payment of such dividends should be levied and collected on January 1, 1881. In deciding that case the Court of Appeals of New York said: l. c. 390.

> "It is claimed by the defendant that if the statute is construed as requiring corporations to make a report in November, 1880, and to pay a tax under the act in January, 1881, it necessitates giving a retrospective effect to the act, which is contrary to principle and the accepted canons of construction. But we are of the opinion that this objection is not well founded. * * * The tax was in no just sense the imposition of a burden for past transactions, or a tax on franchise or business prior to June 1, 1880. The fact that the amount of the tax may in some cases be fixed by reference to the business of the company during the year does not make the act retrospective. The burden it imposes is future and for future expenditures. It is competent for the legislature to adopt such method of valuing the franchise or property of corporations for the purpose of taxation as it deems proper."

The decision in this case was followed in *People* vs. *Goldfogle*, 205 N. Y. St. 870, l. c. 876, and a similar ruling was made in *Drexel & Co.* vs. *Commonwealth*, 46 Pa. St. 31.

The rule is well settled in this state that unless a different intent is evident beyond reasonable question, statutes must be construed as having a prospective operation only. *State* vs. *Public Service Commission*, 317 Mo. 172, 295 S. W. 86; *Cranor* vs. *School District No. 2*, 151 Mo. 119, 52 S. W. 232. Accordingly, appellants urge the acceptance of the prospective construction suggested.

Even if the Court should find that in respect to some employers, for example, employers who are not covered by Title IX of the Federal Act, the Missouri Law is retroactive in operation, this bankrupt has no right to raise the objection. It is a well-established principle that an individual who alleges the unconstitutionality of a statute must show beyond doubt,

not only that the law is unconstitutional but also that the statute in its operation injures him. This rule is recognized and declared in the following cases:

Cofer vs. *Riseling*, 153 Mo. 633, 55 S. W. 235;
Lige vs. *Chicago B. & O. Railway Company*, 275 Mo. 249, 204 S. W. 508;
Stouffer vs. *Crawford*, 248 S. W. 581;
Bourjois vs. *Chapman*, 301 U. S. 183, and the cases there cited, 11 Am. Jur. 748, 81 L. Ed. 1027, 57 S. Ct. 675.

Furthermore, it is a fundamental principle that the judiciary will not pass upon the validity of acts of the legislature except at the suit of one who in a case or controversy shows that he will be adversely affected by the particular feature of the legislative act of which he complains. This doctrine is expressed by Mr. Justice Sutherland of the United States Supreme Court in the following language:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which would otherwise stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement; and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts* vs. *Mellon*, 262 U. S. 474, p. 488, 67 L. Ed. 1078, 43 S. Ct. 597. See also *Alabama Power Company* vs. *Ickes*, 302 U. S. 464, 58 Sup. Ct. Rep. 300, which cites the case of Massachusetts vs. Mellon.

The Missouri Constitution does not render the Unemployment Compensation Law invalid per se. Its validity cannot be questioned unless there is an injury. Burnap-

Meyer, Inc. received no injury. It was entitled to credit against the Federal tax the amount claimed by the State, and it knew it. Its tax burden was not increased.

The facts and the principle involved in this case are similar to those in the case of *In re Knowles*, 295 Pa. 571, 145 Atl. 797, 63 A. L. R. 1086. In that case, the Pennsylvania Supreme Court—despite the fact that a State inheritance statute imposed progressive rates, which the court assumed was contrary to the State Constitution—held that a taxpayer, because not adversely affected thereby, could not challenge his liability for a state tax equal to the excess of the credit allowed against the Federal Estate tax by Section 301 (b) of the Federal Revenue Act of 1926 over the inheritance taxes paid under other laws of Pennsylvania and to other states. The Court said: l. c. 590.

> "It is unnecessary to continue the discussion along this line (alleged invalidity of the state statute), however, for none of the points of attack against the Act of 1927, made by appellants, are involved in this case, since, as before said, appellants are in no wise injured by any provision of that statute; indeed, so far as the main feature of this act is concerned, it is difficult to perceive how it can harm anyone taking estates or having an interest in estates taxes thereunder, because, in each instance, if the additional tax created by the act was not paid to the commonwealth, the same amount would have to be paid to the national government, and, when paid to the commonwealth, the amount in question is allowed by the national government to the estate making the payment. As this court said in *Gentile* vs. *Railroad Company* (274 Pa. 335, 118 Atl. 223), it is of no moment to complainant whether the amount to be paid goes to one person or another, so long as his liability is not prejudicially altered; the same principle applies here."

The justices of the Supreme Court of New Hampshire, when, by resolution of the House of Representatives they were asked to give an opinion as to the constitutionality of a certain bill, on March 3, 1931, expressed this same principle:

> "The bill provides for the imposition of a tax upon property passing by will or inheritance in such an amount as

will make the total of such taxes laid by states, etc., equal to the amount deductible from the federal estate tax, because so laid.

"It makes the imposition of the proposed tax dependent upon the right to deduct the same from the amount of the Federal estate tax, which would otherwise be payable in full to the Federal Government. We are unable to perceive wherein such a provision would violate any constitutional right of the taxpayer. The amount he is called upon to contribute for the support of government is not increased because he has to pay this state tax.

"The nation lays a valid tax and makes valid provision for its partial distribution to the several states, through the process of local assessments and the deduction thereof from the Federal tax. Substance, not form governs in these matters, and this is the substance of the whole transaction.

"It is our opinion that if the bill is enacted it will be a valid law." *In re Opinion of the Justices*, 85 N. H. 572, 573; 154 Atl. 633 (1931).

It is also important in determining whether or not the objecting party is injured to consider the extent to which the taxpayer may have reasonably anticipated the imposition of the tax. This law was no surprise to the bankrupt. Congress by enacting Title IX of the Federal Act and by providing for credit had invited the States to pass unemployment compensation laws. One after another every State in the Union passed an Unemployment Compensation Law.

The United States Circuit Court of Appeals, however, reached a different conclusion. It said that since the Federal Government filed a claim for the entire amount due under Title IX for the year 1937, since the Referee made an order allowing only 10% and since the Federal Government did not appeal it has now lost its right to appeal and to make an additional claim for the additional tax which is undoubtedly due either to the Federal Government or the State of Missouri. It is obvious that the Federal Government failed to appeal from the order of the Referee in the instant case on the presumption that the 90% would be paid to the State. The Federal Government was unaware of the fact that a court

would find that it had relinquished its rights. If Federal Courts in the Eighth Circuit are to follow the decision, which they are bound to do, the Federal Government can never safely ask the Court to pass upon its claim until after the claim to the State is allowed and paid. If the Court should allow the Federal claim in the amount of only 10% as it did in this case, the Federal Government will always be required to appeal or lose its right to claim the additional amount.

In view of the fact that the court found that the Federal Government is now barred from collecting the remainder of the tax, the court further found that the bankrupt estate would be injured if it had to pay a tax to the State of Missouri and therefore, since there is an injury, it does have the right to raise the constitutional objection.

The court has based its finding that there is an injury and, therefore, that the law is retrospective in operation and unconstitutional on a freak situation—one that was never contemplated in the operation of the law. A law must be judged not by its effect in an isolated case, but by its general application and its effect when it operates as the taxing authorities intended. The law was never meant to operate in such a way as to permit the trustee to get out of paying this tax. The injury has resulted from an erroneous order of the referee and not because of any defect in the law. An isolated harsh application of a generally valid law is of no moment, the rule being that if a law is generally reasonable, an unfair result in a particular case may be disregarded. *Powell* vs. *Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253, 8 S. Ct. 1257; *Olis* vs. *Parker*, 187 U. S. 192, 47 L. Ed. 323, 23 S. Ct. 168; *Hebe Co.* vs. *Shaw*, 248 U. S. 297, 63 L. Ed. 255, 39 S. Ct. 125; *Pierce Oil Corporation* vs. *Hope*, 248 U. S. 498, 63 L. Ed. 381, 39 S. Ct. 172; *Ruppert* vs. *Caffey*, 251 U. S. 264, 64 L. Ed. 260, 40 S. Ct. 141; *National Prohibition Cases*, 253 U. S. 350, 64 L. Ed. 946, 40 S. Ct. 486; *Everard's Breweries* vs. *Day*, 265 U. S. 545, 68 L. Ed. 1174, 44 S. Ct. 628; *Euclid* vs. *Ambler Co.*, 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114; *Lambert* vs. *Yellowley*, 272 U. S. 581, 71 L. Ed. 422, 47 S. Ct. 210. Should the courts hold that a law, which is fair in its general operation, is unconstitutional merely because, due to an erroneous order, an injury occurs in an isolated case?

Should the court shield one who claims that a law injures him and is therefore unconstitutional when the unfavorable

position in which he finds himself is due to his refusal and failure to obey another law? One cannot assert a failure to comply with one law as a defense to a suit based upon another. The trustee's failure to follow the specific mandates of Section 124a Title 28, U. S. C. A. is the sole ground for his being able to show he is injured. The petitioner cannot agree with the Circuit Court of Appeals and asks this Court to exercise its supervisory powers and correct the wrong which has been inflicted.

The Court by its decision has sanctioned the failure of bankrupts to comply with both State and Federal Laws. It has reached a wrong result based upon an erroneous order of a Referee. It has exempted a bankrupt estate from taxation. It has defeated the whole purpose of the Federal Social Security Act which, by inviting the States to pass unemployment compensation laws and allowing credit against the Federal tax, has indirectly made it possible for unemployed workers to obtain benefits from a fund which consists of contributions paid by employers.

2.

The Court erred in failing to give effect to Section 6 (C) (d) of the Missouri Unemployment Compensation Law, (Laws of Missouri, 1937, p. 587, quoted in Appendix, p. 40).

This section specifically levies a tax in addition to any tax which may be levied under 6 (A) (1), quoted at page 16, so that the actual tax payment due Missouri must equal 90% of the tax levied under Title IX of the Federal Social Security Act. This tax cannot be said to be retrospective in operation. It is not based upon the payment of wages payable for employment prior to June 17, 1937. Its obvious purpose is to perfect the coordinated scheme which the Federal Act visualizes. The Legislature wanted to make sure that Missouri workers received the full benefits provided by the Unemployment Compensation Law. The Federal tax provides for 90% credit. The Federal Government pays no benefits to workers. Benefits are paid from the 90% paid to the States. Both the Federal Government and the State are anxious to see that this 90% is paid to the State. The petitioner urges upon this Court that there is no possibility of the appellee avoiding the payment of this tax for it has accrued

under either Section 6 (A) (1) or 6 (C) (d) of the Law and the United States Circuit Court has erred in reducing petitioner's tax claim by the amount of $530.09.

3.

The Court erred in failing to order the payment of interest.

Section 15 (a), Laws of Missouri, 1937, p. 598, provides that:

> "Contributions unpaid on the date on which they are due and payable * * * shall bear interest at the rate of one per centum per month from and after such date until payment plus accrued interest is received by the Commission. * * *"

The petitioner feels that this Court has expressed its opinion in regard to the payment of interest in bankrupt cases in the case of *United States* vs. *Childs, Trustee in Bankruptcy of the J. Menist Company, Incorporated*, 266 U. S. 304, 69 L. Ed. 299, 45 S. Ct. 110. Since the facts and the interest rate in the Childs case are comparable to those in the instant case, the petitioner quotes from this decision, l. c. 309:

> "We are unable to concur" (referring to the decision of the Referee that the statutory provision for interest amounted to a penalty and relieving the estate in bankruptcy from the payment thereof, which decision was affirmed by the District Court) "it makes the rate of interest that of a particular locality, differing with the locality—in N. Y. as said by the Government 6%, in the Middle West 8% and on the Pacific Coast 10%—and abridges or controls a federal statute by a local law or custom, and takes from it uniformity of operation. Besides, the federal statute is precise, and it is made peremptory by the distinction between 'penalty' and 'interest', and if it may be conceded that the use of the latter word would not save it from condemnation if it were in effect the former, it cannot be conceded that 1% per month—12% per year—gives it that illegal effect, certainly not against legislative declaration that is within the legislative power, there being no ambiguity to resolve. * * * "

The Circuit Court of Appeals, Seventh Circuit, in the case of *In re Martin*, 75 Fed. (2d) 618, and the Circuit Court of Appeals, Second Circuit, in the case of *In re Semon*, 11 Fed. Supp. 18, 80 Fed. (2d) 81, arrived at the same conclusion.

The petitioner maintains that "Interest" is charged by the Missouri Law solely in recognition of the use of money unpaid to the State. The rate of one per cent per month has been upheld as reasonable in the above-mentioned cases. The Circuit Court in its decision points out the fact that the claim arose out of operations carried on under the supervision of the court and the fact that the assets are inadequate to pay the principal amount of the claims allowed as costs of administration. The proportionate part of the assets which the petitioner will receive should not be reduced because no claimant will be paid in full. The petitioner is entitled to have its claim allowed in the full amount due.

The Court states that, as a general rule, after property of an insolvent passes into the hands of the Court, interest on claims is not allowable against the estate. It quotes from the case of *Thomas* vs. *Western Car Company*, 149 U. S. 95, 37 L. Ed. 663, 13 S. Ct. 824. "The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." The Court failed to recognize that in the Western Car Company case, the Court in its opinion dealt only with general claims. The petitioner's claim is a tax claim. There is no reason for delay in the payment of taxes. Section 124a, Title 28, U. S. C. A., previously quoted at p. 16, states that those appointed to conduct the business shall be subject to State and local taxes the same as if the business were conducted by an individual or a corporation, and necessarily contemplates the payment of the same. The reason for the rule of the Western Car Company case is defeated where the claim is for taxes. The Court in the case of *In re Kallok*, 147 Fed. 276, explained in detail why interest should be paid on tax claims but should not be paid on other claims.

The Court in its decision made the following statements: l. c. 277.

> "The contention of the Trustee rests entirely upon the ground that public taxes constitute a claim against the bankrupt estate to be paid with other claims in the ordinary course of administration. As other claims are not

> permitted to draw interest after the adjudication it is, therefore, contended that the amount of the public demand for taxes is subject to the same restriction. * * * "There are two reasons why ordinary claims of creditors are not permitted to draw interest subsequent to the adjudication. First, it is important that the proportionate interest of the several creditors in the estate be ascertained and fixed. If interest were to accrue, however, after the adjudication, the amount of the several claims would vary from time to time, according to their respective rates of interest and the proportionate share of the several creditors would be subject to constant adjustment. The second reason is the convenience of administration. If, at the declaration of every dividend, a new basis of apportionment were required, depending upon varying rates of interest, the administration of the estate would be seriously complicated. In the case of public taxes neither of these reasons has any application because they do not share the estate with the claims of private creditors. * * *"

The Circuit Court cites the case of *American Iron and Steel Manufacturing Company* vs. *Seaboard Air Line Ry.*, 233 U. S. 261, 58 L. Ed. 949, 34 S. Ct. 502, in support of its finding that interest should not be paid where the assets are insufficient to pay the principal amount of claims allowed. The Circuit Court failed to mention that the Court did allow interest on a debt for goods from the expiration of credit until payment. Any statements to the contrary were merely dictum. Furthermore, the case dealt with general claims and not tax claims, and was decided before Section 124a, Title 28, U. S. C. A. was enacted.

The petitioner is asking only for interest and not penalties. However, in the recent case of *Boteler* vs. *Ingels*, 308 U. S. 57, 84 L. Ed. 20, 60 S. Ct. 29, this Court held that even fees and penalties which come due while a trustee is operating the business should be paid, since if such were not the case: l. c. 61.

> "a state would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would

be denied the traditional and almost universal method of enforcing prompt payment."

Surely a court which allows fees and penalties will not deny the payment of interest as provided under the statute.

If the Court should find that interest should not be paid at the rate provided for by the statute, the petitioner respectfully requests the Court to find that interest should be allowed at the rate of 6%.

New York vs. *Jersawit*, 263 U. S. 493, 68 L. Ed. 405, 44 S. Ct. 167, distinguished in the Childs case;

In re *Pressed Steel Car Company of New Jersey*, 100 Fed. (2d) 147.

4.

The Court erred in refusing to determine whether or not contributions exacted under the Missouri Unemployment Compensation Law are taxes within the meaning of the Bankruptcy Act and entitled to priority because Section 124a, 28 U. S. C. A. directs payment.

The Court states that it was unnecessary in this proceeding to determine whether or not contributions under the Missouri Unemployment Compensation Law is a tax because the petitioner's claim has been allowed as an administrative expense and the petitioner has, therefore, not been prejudiced. The petitioner concedes that its claim was properly allowed as an administrative expense. However, debtors operating under owner-management, a trustee or other fiduciary are liable for the payment of taxes as they accrue.

28 U. S. C. A., Section 124a;

Board of Directors, etc. vs. *Kurn*, 98 Fed. (2d) 394 (C. C. A.—8, 1938);

Hennepin County vs. *M. W. Savage Factories*, 83 Fed. (2d) 453 (C. C. A.—8, 1936); Certiorari denied, 299 U. S. 555;

Thompson vs. *State of Louisiana*, 98 Fed. (2d) 108 (C. C. A.—8, 1938).

They are not required to pay general claims. The petitioner contends that if contributions are taxes, Section 124a, Title 28, U. S. C. A. is applicable. Otherwise, it is not.

The petitioner contends that interest accrues on taxes from the due date until date of payment, whereas it has been held that they do not accrue on general claims after the filing of the petition.

In re Kallock, 147 Fed. 276;
Thomas vs. *Western Car Co.*, 149 U. S. 95, 37 L. Ed. 663, 13 S. Ct. 824.

Therefore, your petitioner is entitled to have (and the lower court erred in refusing to determine) determined whether these contributions claimed are taxes. While the lower court disclaimed any determination of the issue, the only legal foundation for the lower court's decision is that contributions are not taxes, for then they could properly be pro-rated with other general creditors' claims as administrative expenses, and interest could properly be denied.

The Circuit Court in refusing to pass upon this question has left the way clear for lower courts to classify the petitioner's claim as a general claim rather than a tax claim in every case which is now pending and every case which will arise in any District Court in Missouri. It has in effect stated that the entire amount of the tax due under Title IX of the Federal Act shall be paid prior to the payment of the State's claim for contributions, since it does not deny that the federal tax is a tax and priority claims are paid in full before any part of general claims are paid. It has in effect defeated the whole purpose of the Social Security program. The Federal Act and the State Law were intended to operate in harmony, one with the other. They should be so construed.

This Court has never passed upon the question of whether or not contributions exacted under the Missouri Unemployment Compensation Law or under the unemployment compensation law of any other state are taxes within the meaning of the Bankruptcy Act. It is of vital importance, not only in the case at hand, but in a large percentage of the bankruptcy cases in every state, that this question be definitely decided by this Court.

In cases where the question of priority under the Bankruptcy Act was not involved, this Honorable Court has found that contributions exacted under the Unemployment Compensation Laws of Alabama and Arkansas are taxes. In the case

of *Carmichael* vs. *The Southern Coal & Coke Company*, 301 U. S. 495, 508, the following statement is found:

> "*In Beeland Wholesale Company* vs. *Kaufman*, 234 Ala. 249, 174 S. 516, supra, the Supreme Court of Alabama held that the contribution which the statute exacts of employers are excise taxes laid in conformity to the Constitution and Laws of the state. While the particular name which a state court or legislature may give to a money payment commended by its statute is not controlling when its constitutionality is in question, * * * we see no reason to doubt that the present statute is an exertion of the taxing power of the State. * * * Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property for its use, but they may likeise be laid on the exercise of personal rights and privileges. As the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within state taxing power, and it is immaterial whether it is called an excise or by another name."

The Carmichael case was followed by the case of *Buckstaff Bath House Company* vs. *McKinley*, 198 Ark. 91, 127 S. W. (2d) 802, which case arose under the Unemployment Compensation Law of Arkansas. The decision of the Supreme Court of Arkansas reads in part as follows: l. c. 99.

> "The Legislature has the right to require that employers make contributions in the manner provided by the Act 155. The National Social Security Act denominates the contribution 'an excise tax levied on employers.' That the required payment is referred to in our Act 155 as a 'contribution' is of no significance. It is a compulsory contribution and therefore a tax."

The case was submitted to this Court on writ of certiorari. 308 U. S. 358, 60 S. Ct. 279, 84 L. Ed. 242. The decision portrays a true picture of the Social Security program, l. c. 363:

> "That petitioner is subject to the Social Security Act is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a

grave emergency problem. As pointed out by this Court in *Steward Machine Company vs. Davis, supra*, p. 588, that Act was an attempt to find a method by which the states and the federal government could 'work together to a common end'. Prior thereto many states had held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. *Id*, p. 588. The Act was designed therefore to operate in a dual fashion—state laws were to be integrated with the Federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief. It is this invitation by the Congress to the states which is of importance to the issue in this case. For certainly, under the coordinated scheme which the Act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in absence of a declaration to the contrary, it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coordinated and integrated dual system would not materialize.

"Hence it is our view that on the facts of this case, Congress has given Arkansas implied authority to tax petitioner under its Unemployment Compensation Law since the Congress has included under the Social Security Act employers such as petitioner. Clear evidence of a contrary intention would, of course, negative the existence of the implied authority. But here there is none. That conclusion is strengthened by the exemption of certain classes of employers from the sweep of the Federal Act. Thus, the exclusion of federal instrumentalities from the scope of the Federal Act, and hence from the comple-

mentary state systems, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from state taxation. Had it been desired to exempt the equally well known class, of which petitioner is a member, so as to save it from reciprocal state systems, it would seem that an equally clear exception would have been made."

However, these decisions do not involve contributions levied under the Missouri Law. The questions involved did not arise under the Bankruptcy Act. It is imperative, if the Missouri Unemployment Compensation Law is to function and operate as its framers intended, that this Court decide that contributions levied under the Missouri Act are taxes within the meaning of the Bankruptcy Act.

The Courts in various states have held that contributions levied under their unemployment compensation laws are taxes:

Beeland Wholesale Company vs. *Kaufman*, 234 Ala. 249, 174 So. 516;

Buckstaff Bath House Company vs. *McKinley*, 198 Ark. 91, 127 S. W. (2d) 802;

Texas Company vs. *Leon L. Wheeless*, 185 Miss. 799, 187 So. 880;

Fidelity-Philadelphia Trust Company vs. *Lewis G. Hines*, 10 Atl. (2d) 553.

Whether or not contributions are taxes has never been a question directly in issue in a case decided by the Supreme Court of Missouri. However, in a decision handed down on June 28, 1940, not yet reported, in the case of *Murphy, Sr., et al.* vs. *Hurlbut Undertaking and Embalming Company*, the court stated:

"What our State Act denominates as contributions, the Federal Act (42 U. S. C. A. Sec. 1101) calls an *excise tax*."

By this language the court indicated it would hold that contributions are taxes if the question comes before it.

Various lower courts have handed down decisions, some of which have been reported, construing unemployment

compensation contributions as taxes within the meaning of the Bankruptcy Act.

In re Oshkosh Foundry, 28 Fed. Supp. 412 (U. S. D. C. Wis. 1939);
In re Mid-America, 31 Fed. Supp. 601, (U. S. D. C. Ill. 1939);
In re Sixty-Seven Wall Street Restaurant Corporation, 23 Fed. Supp. 672, (U. S. D. C. N. Y. 1938);
In re Lambertville Rubber Company, 27 Fed. Supp. 897, (U. S. D. C. N. J. 1939);
In re Wilsonite Corporation, 28 Fed. Supp. 913 (U. S. D. C. N. J. 1939);
In re Lechtman Printing Company, Prentice Hall No. 29595, set out in appendix at p. 43, (U. S. D. C. Mo. 1939).

Other district courts have handed down contrary decisions:

In re Mosby Coal and Mining Company, 24 Fed. Supp. 1022 (U. S. D. C. Mo. 1938);
In re DeGraw Motor Co. (U. S. D. C. Neb. 1938) not officially reported;
In re William Akers, Inc., 31 Fed. Sup. 900.

The petitioner insists that, in view of the conflicting decisions which are being handed down by the various district courts, this question should be settled by the court of highest authority.

The petitioner maintains that contributions demanded under the provisions of the Missouri Unemployment Compensation Law fall within the taxing power of the State of Missouri as set out by Section 3, Article X of the Constitution of Missouri (Mo. Stat. Ann. Vol. 15, page 733) which provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general law."

Unemployment is unquestionably a risk to the safety and welfare of the people and a threat to our economic structure. When the General Assembly enacted a law providing for the payment of benefits to the unemployed it also provided for the general welfare of all its people. "General welfare" and "public purpose" are one and the same. This well established doctrine is expressed by the courts in the following cases.

Charles G. Steward Machine Company vs. *Davis*, 301 U. S. 548, 81 L. Ed. 1279, 57 S. Ct. 883;

Helvering et al. vs. *Davis*, 301 U. S. 619, 672, 81 L. Ed. 1307, 57 S. Ct. 904;

In re Oshkosh Foundry Company, 28 Fed. Supp. 412;

State ex rel. Gilpin vs. *Smith*, 96 S. W. (2d) 40, 339 Mo. 194 (Sup. Ct.);

Jennings vs. *City of St. Louis*, 58 S. W. (2d) 979, 332 Mo. 173.

The Circuit Court of Appeals intimated that the act of the legislature gave contributions a subordinate position in respect to priority. This suggestion was founded upon Section 15 (c) of the Act of June 17, 1937, which read:

> "In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes and claims for wages of not more than $500.00 to each claimant earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of 1898, as amended contributions then or thereafter due shall be entitled to such priority as is provided in Section 64 (b) of that Act (U. S. C., title XI, sec. 104 (b)), as amended."

Why the legislature stated that in some instances contributions should be paid in full prior to all other claims except taxes, we do not know, because the law was amended in 1939 and this paragraph was omitted (Laws of Missouri, 1939, p. 887).

Certainly a state has the right to give priority to certain taxes over others if it so desires. However, in the case of bankruptcy the Legislature stated that contributions should be given the priority as provided in section 64 (b) 11 U. S. C. A. 104 (b) of the Bankruptcy Act. At the time the Missouri Unemployment Compensation Law was passed, Section 64 (b) gave priority to both taxes and debts due to the States (Appendix p. 38). Therefore that is no indication that the State did not treat and consider the contributions as taxes.

The fact is immaterial that Section 15 (b) (Appendix p. 41) of the original Act and Section 15 (h) (Appendix, p. 42) of the amended Act provide that if any employer defaults in payment of any contributions, the amount due shall be collected by civil suit. It makes no difference that some taxes may be collected in a different manner from other taxes. A state can adopt any method it chooses to collect the tax which it exacts. As this court in the case of *State of New Jersey* vs. *Anderson*, 203 U. S. 483, 51 L. Ed. 284, 27 S. Ct. 137, stated:

"The form of procedure cannot change their character."

Neither can any importance be attached to the fact that throughout the Act the tax is designated as a contribution. The character of an exaction can't be changed by changing its name. Contributions paid under this Act are compulsory payments made for a public purpose. It matters not that only a certain class of employing units pays the tax, that only certain types of workers receive the money payments or that the money collected is kept separate and apart from other taxes. (Section 12 (a) Appendix p. 41.) This tax comes within the definition of a tax as is stated in 61 C. J. 68:

> " * * * the essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority * * * ."

The following paragraph quoted from the case of *State of New Jersey* vs. *Anderson*, 203 U. S. 483, 51 L. Ed. 284, 27 S. Ct. 137, summarizes petitioner's position in respect to the contributions levied by the unemployment compensation law, l. c. 492:

"The language of the Act (referring to Section 64 (a) of the Bankruptcy Act) is very broad and includes all taxes. * * * As was said by Mr. Justice Field, speaking for the Court in *Meriwether* vs. *Garrett*, 102 U. S. 472, 513: 'Taxes are not debts. Taxes are imposts levied for the support of the Government, or for *some special purpose authorized by it.* The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some States * * * an action of debt may be instituted for their recovery. The form of procedure cannot change their character.'" (Underscoring and parentheses supplied.)

See also

Macallen Company vs. *Massachusetts*, 279 U. S. 620, 625, 73 L. Ed. 874, 49 S. Ct. 432;

Houck vs. *Little River District*, 239 U. S. 254, 60 L. Ed. 266, 36 S. Ct. 58.

Contributions under the Missouri Law are taxes and are considered and treated as such in all respects. The decision of the Circuit Court of Appeals was proper in allowing petitioner's claim as an administrative expense, but petitioner respectfully asserts that since the enactment of Section 124a of Title 28 U. S. C. A., taxes accruing during administration are entitled to a preference over other administrative expenses for the reason that Section 124a requires payment thereof as though the trustee were an ordinary individual or corporation. Reasonable effect cannot be given to Section 124a unless it is recognized that such payments to the State are required to be made by an individual or corporation as a priority over other claims. Therefore, we respectfully urge that the court should have directed the payment in full of the taxes accruing during administration as a priority over other claims accruing during administration.

The court in the case of *In re Otto F. Lange Company*, 159 Fed. 586, well stated the position which should be taken in determining whether or not moneys due to the states are taxes within the meaning of the Bankruptcy Act: l. c. 588.

"It is obvious that the word 'tax' as used in the Bankruptcy Act is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by

the State and general governments under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term 'tax' as used in the Bankruptcy Act. Nor is the meaning of the word 'tax' as used in the Bankruptcy Act to be determined by the state courts so as to exclude the federal courts. That is a federal statute, the interpretation and meaning of which is to be determined ultimately by the federal Courts."

The foregoing cited cases clearly indicate that the term "taxes," as used in the bankruptcy statutes, is to be broadly and all inclusively construed. We respectfully assert that this same broad and all inclusive construction should be given to the term "taxes" as used in Section 124a, Title 28, U. S. C. A. When that Section is so construed, the only logical result can be that petitioner's claim is entitled to priority over other administrative expenses and that interest should have been ordered paid as provided for in the statute.

VII.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

HARRY G. WALTNER, JR.,
Chief Counsel,

VIVA N. HUNT,
Assistant Counsel,
For Petitioner.

APPENDIX.

Section 64 of the Bankruptcy Act, 11 U. S. C. A. 104 (a), (b) (6) (7), reads as follows:

"(a) The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, than no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the Court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the Court.

"(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * *

"(6) taxes payable under paragraph (a) hereof and

"(7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, that the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

Section 347 of Title 28 U. S. C. A. (Judicial Code, Section 240, amended) reads as follows:

"Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

"(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, where Government or other litigant, to require

by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

"(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of the circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

Section 903 (a), Social Security Act, 42 U. S. C. A. 1103, reads as follows:

"(a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which is finds provides that—

"(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

"(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

"(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904;

"(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation exclusive of expenses of administration;

"(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

"(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time. * * *"

Section 6 (B) of the Missouri Unemployment Compensation Law (Laws of Missouri, 1937, p. 585) reads:

"Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

(1) One and eight-tenths per centum with respect to employment during the calendar year 1937;

(2) Two and seven-tenths per centum with respect to employment during the calendar years 1938, 1939, 1940 and 1941.

(3) With respect to employment after December 31, 1941, the percentage determined pursuant to subsection (c) of this section."

Section 6 (C) (d) of the Missouri Unemployment Compensation Law (Laws of Missouri, 1937, p. 587) reads:

"If the total amount of contributions required to be made under this Act by any employer for any period ending on December 31st of any calendar year based on wages paid

by all employment units of such employer within this state, plus any credits allowed such employer under the provisions of Section 6 (C) (3) (b), shall not equal 90 per cent of the tax under Title IX of the Social Security Act, levied against such employer based on wages paid by all the employing units of such employer within this state for the same calendar year ending December 31st., then such employer shall make an additional contribution equal to the difference between said 90 per cent of said tax levied under said Social Security Act and the total amount of contributions required to be made under this Act."

Section 12 (a) of the Missouri Unemployment Compensation Law (Laws of Missouri, 1937, p. 595) reads as follows:

"(a) There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclusively for the purposes of this Act. This fund shall consist of:

"(1) All contributions collected under this Act, together with any interest thereon collected pursuant to section 15 of this Act;

"(2) interest earned upon any moneys in the fund;

"(3) any property or securities acquired through the use of moneys belonging to the fund;

"(4) all earnings of such property or securities;

"(5) all voluntary contributions permitted under this Act; and

"(6) all funds set aside or appropriated by the Congress of the United States or the United States Social Security Board to be deposited to the fund.

"All moneys in the fund shall be mingled and undivided."

Section 15 (b) of the Missouri Unemployment Compensation Law (Laws of Missouri, 1937, p. 599), reads as follows:

"(b) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount

due shall be collected by civil action in the name of the commission, and the employer adjudged in default shall pay the costs of such action. Civil action brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this Act and cases arising under the workmen's compensation law of this state."

Section 15 (h) of the Missouri Unemployment Compensation Law, as amended in 1939, (Laws of Missouri, 1939, p. 925), reads as follows:

"If any employer defaults in the payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the three Commissioners administering this Act as members of the Commission. In the event of the death, removal, resignation or expiration of the term of any Commissioner resulting in a change of personnel of the Commission, the successor or successors shall be substituted as parties plaintiff on motion of counsel. Such suit shall be brought in the county wherein the employer resides or has a place of business or agent for the transaction of business in this state or where he or it may be found, and the employer adjudged in default shall pay the cost of such action. Any civil action brought under this Act shall be heard by the court at the earliest possible date and shall be entitled to preference on the calendar of the court over all other civil actions except petitions for judicial review under this Act and cases arising under the Workmen's Compensation Law of this state. If any employer shall fail to resort to the remedy herein provided for reassessment of any contributions, interest or penalty within the time as provided herein, such employer shall thereafter be precluded from asserting any defense in a direct suit for the collection of the contributions."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION.

In the Matter of
LECHTMAN PRINTING COMPANY, a corporation, *Debtor.*

In Bankruptcy
No. 15,358.

MEMORANDUM AND ORDER ON PETITION TO REVIEW ORDER OF REFEREE.

We think the order of the referee here sought to be reviewed was the right order. We state our reasons for those conclusions.

1. Under the Chandler Act, as well as the Bankruptcy Act of 1938, governmental entities to which taxes are owing are entitled to priority as to taxes over creditors for general claims. What was paid the Unemployment Compensation Commission of Missouri was the payment of a tax obligation. *Carmichael* v. *Coal & Coke Co.*, 301 U. S. 495.

2. Whether the obligation was a tax obligation, undoubtedly it was a debt to a person who, by the Bankruptcy Act of 1898, was entitled to priority over general creditors. So much, in effect, was conceded at the argument of the petition to review by learned counsel for the trustee.

It was substantially conceded also by learned counsel that the order made by the referee directing the trustee to pay the claim of the Unemployment Compensation Commission was, when it was made, a lawful order. The order was made August 13, 1938.

The Chandler Act became effective, by its terms, on September 22, 1938. It provided (or a contemporaneous act applicable to the Chandler Act provided)—

> "Except as otherwise provided in this amendatory act, the provisions of this amendatory act shall govern proceedings, so far as practicable, in cases pending when it takes effect."

It seems very clear to us that the proper interpretation of the language quoted is this: as to questions in pending cases which have not been decided when the Chandler Act

becomes effective (i. e. September 22, 1938), those questions shall be decided in accordance with the provisions of the Chandler Act so far as practicable.

But the question of whether the payment of the Unemployment Compensation Commission's claim, as a claim entitled to priority, should be made or not made, was presented to the referee and decided by the referee on August 13, 1938. That was a question which did not arise after September 22, 1938, in the sense contemplated by Congress when it provided that the Chandler Act "*shall* govern proceedings, so far as practicable, in cases pending when it takes effect."

ORDER.

The order of the referee is confirmed and approved. IT IS SO ORDERED.

_____

District Judge.

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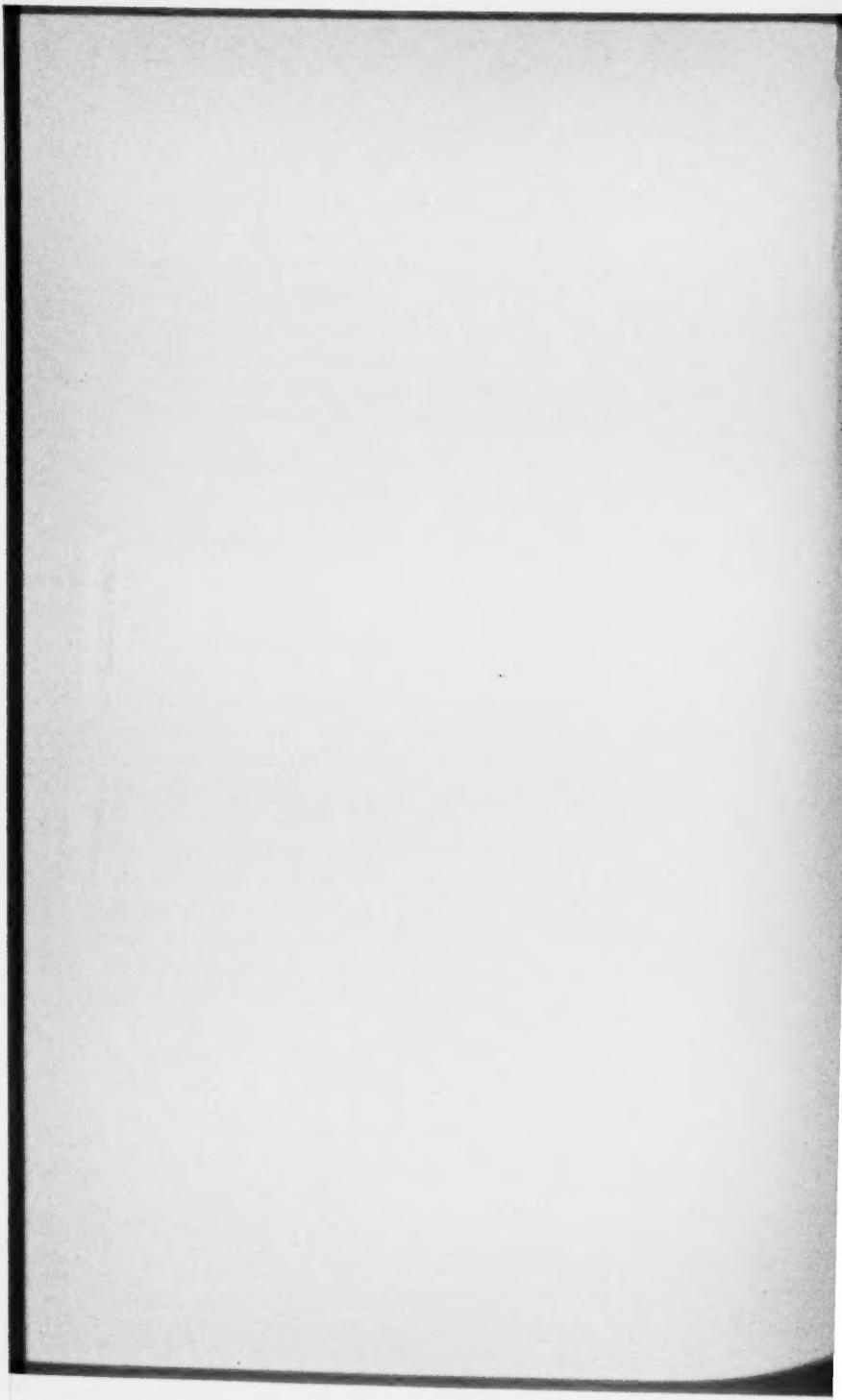

Supreme Court of the United States

OCTOBER TERM, 1940

No. 308

STATE OF MISSOURI, by and through the UNEMPLOYMENT COMPENSATION COMMISSION and HARRY P. DRISLER, Treasurer, *Petitioners*,

vs.

WARREN S. EARHART, Trustee in Bankruptcy for BURNAP-MEYER, INC., *Respondent*.

RESPONDENT'S STATEMENT AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioners so confuse essential facts in a maze of detail and argument that we deem it necessary to restate the case:

Involuntary petition in bankruptcy was filed against Burnap-Meyer, Inc., on November 12th, 1936. Answer and petition of the bankrupt for reorganization under Sec-

tion 77-B of the Bankruptcy Act was filed and approved December 13th, 1936. Owner-management was accorded the debtor, which continued to April 14th, 1938, when a temporary Trustee was appointed.

On May 21st, 1938, a final order of liquidation was entered, the bankrupt's property ordered sold, and the case referred to the Referee.

There was realized in the liquidation an amount insufficient to pay the balance due merchandise and other creditors, including petitioners, on their allowed claims, all of which have been allowed as administrative expense, because these claims accrued while the bankrupt operated under the District Court's supervision through "owner-management." (Tr. 2-3).

The Missouri Unemployment Compensation Law became effective June 17th, 1937. Prior thereto Missouri had no such law. This Missouri Act was amended in 1939, but the amendments were effective long after this case was tried and are not controlling. (Tr. 3).

Petitioners claimed against the bankrupt estate for $1,559.26 for "contributions" alleged to be due under the Missouri Act for the period from January 1st, 1937, to April 14th, 1938, with interest. The claim was amended during the trial of Trustee's objections thereto, over Trustee's objection, to show the claim accrued during the period of owner-management. (Tr. 3).

The amount of contributions, based upon wages paid during the entire calendar year 1937, was $1,123.03; and upon wages paid after the effective date of the Missouri Act, $592.94. Those for the portion of the year preceding the Act's effective date were $530.09. The amount claimed for that part of 1938 from January 1st to April 14th was not in dispute. (Tr. 4).

The Federal Collector of Internal Revenue filed claims against the estate for the full two per cent provided under Title IX of the Federal Social Security Act covering the entire calendar year 1937 (Tr. 4, Ex. G, Tr. 19-20). Hearing provided in Sec. 64 of the Chandler Act (11 U.S.C.A. 1939, P.P. page 16) was had on all four of the Federal Collector's claims, including the full two per cent of wages for the calendar year 1937, resulting in the Referee's order (Ex. H. Tr. 21), by which these claims were allowed in the amount only of $564.58. No petition for review or appeal was taken, and the amount was promptly paid by the Respondent (Tr. 4-5).

After full hearing before the Referee on Respondent's objection to Petitioners' Amended Claim, the Referee found (1) it practicable to apply the Chandler Act to said claim; (2) that the "contributions" were not taxes within the purview of the Missouri Constitution; (3) that no recovery could be had of the $530.09 accruing before the effective date of the Missouri Act, because of the inhibition in the Missouri Constitution; (4) that no interest on the allowed portion of the claim would be granted; (5) that Petitioners' claim be allowed for $1,029.17, the contributions computed under the Missouri Act from June 17th, 1937 to April 14th, 1938, as an expense of administration, and be placed upon a parity with all other claims arising under "owner-management." (Tr. 5, Ex. I, Tr. 21-23).

Petitioners filed petition for review, and the case was heard thereon by Judge Reeves. He rendered a memorandum opinion (Tr. 6, Ex. J, Tr. 24-26), and entered a judgment confirming the Referee's order (Tr. 6, Ex. K, Tr. 27), which was in accordance with the memorandum.

Upon appeal to the Circuit Court for the Eighth Circuit the case was affirmed. In an opinion by Judge Thomas (Tr. 33-40), that court held it unnecessary to determine whether or not the contribution in question constituted a tax because by allowance of the claim as an administrative expense, it had been accorded a higher rating of priority than that claimed for it under Section 64 (a) (4), 11 U.S.C.A. 104 (a) (1).

An anomalous situation presents itself. Petitioners' claim was allowed below as an "administrative expense" and placed upon a parity with the other debts of the bankrupt accruing during the period of "owner-management." Under such circumstances, petitioners will realize in dividends eighty or ninety per cent of their allowed claim. Should petitioners sustain their contention, their claim would be relegated to the fourth class under Section 64 of the Chandler Act, and they would never collect one cent of their claim so allowed. Unless, therefore, petitioners are more interested in procuring a construction of a section since amended, than they are in adding to the Unemployment Compensation Fund, this application would appear ridiculous.

Reasons for Denying Writ

1. The petition for the writ does not comply with Rule 38 of the court, in that, it contains no statement particularly disclosing the basis upon which petitioners contend that this court has jurisdiction to review the judgment and decree in question, nor are the questions presented separately and cogently stated, as required by said Rule.

2. The petitioners' summary and statement of the matter involved and their supporting brief annexed to

said petition violate said Rule in that they fail to be a direct and concise statement of the case and the law applicable thereto.

3. The petition and supporting brief fail to disclose any special or important reasons impelling the exercise of this court's sound judicial discretion in granting the writ of certiorari, and assuming jurisdiction of the case. None of the reasons relied upon by petitioners for the allowance of the writ come within the purview of Rule 38, Par. 5.

4. The opinion below (Tr. 32-40) correctly determines the law with respect to the facts as set forth in the agreed statement of the case (Tr. 1-6).

BRIEF AND ARGUMENT.

I.

The petition for certiorari does not comply with Rule 38 with reference to statement of jurisdiction of statement of questions presented.

The petition contains no statement particularly disclosing the basis upon which petitioners contend this court has jurisdiction to review the judgment and decree in question. Nor have the questions presented been separately and cogently stated, as is required by Rule 38. The brief in support of petition, whether included in petition or printed separately, is not a part thereof and cannot expand or add to questions stated in the petition. *General Talking Picture Corporation* v. *Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273.

II.

Petitioners' summary and statement of the matter involved is not a direct and concise statement of the case within the meaning of the rules of this court.

Reference to Respondent's statement aforesaid evidences that the petitioners, in their "Summary and Statement of the Matter Involved" have so garbled the essential facts in a maze of argument as to violate said Rule. Reference to the supporting brief evidences that it does not contain any direct and concise statement of the case and the law applicable thereto. Rule 38.

III.

Neither the petition for certiorari nor the supporting brief disclose any reason for the granting of the writ by this court within the purview of Rule 38, Par. 5.

Reference to the petition and supporting brief fails to disclose any special or important reasons impelling the exercise of this court's discretion in granting the writ, and thereby assuming jurisdiction of the case. None of the reasons assigned by petitioners for its allowance come within the purview of Rule 38, Par. 5.

IV.

Petitioners assign four specifications of error, summarize the argument and argue the petition for the writ under four headings. For the court's convenience, we will adopt the same order in argument as have petitioners.

(a) There was no error in refusing to allow Petitioner's claim for contributions prior to June 17th, 1937, the effective date of the Missouri Unemployment Compensation Act.

The Missouri Unemployment Compensation Act was passed, approved and effective June 17th, 1937. Prior thereto, Missouri had no such Act (Tr. 3).

Petitioners claim to be entitled to recover contributions covering the entire wages paid by the bankrupt during the calendar year 1937, *i. e.*, 1.8% on $62,390.65, or a total contribution for the calendar year 1937 of $1,123.03. It was agreed that the wages paid out prior to June 17th, 1937 by the bankrupt were $29,449.65, the contributions upon which, at 1.8% equaled $530.09 (Tr. 13). The Trustee maintained, and the Referee and the District Court and the Circuit Court properly found, that there could be no recovery for contributions claimed to have been due prior to the effective date of the Missouri Act. *Section* 15 of *Article II* of the *Missouri Constitution* (Mo. St. Ann. Vol. 15, page 304) provides:

"No *ex post facto* law, nor law impairing the obligation of contracts, or *retrospective in its operation,* or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." (Italics ours).

In *Smith* v. *Dirckx,* 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510, the Missouri Supreme Court *en banc* held that an income tax law cannot include in its operation income received during the calendar year prior to its passage because of the aforesaid Constitutional provision that no law retroactive in its operation shall be passed. In so deciding the court significantly said:

"It will thus be seen that our Constitution contains an express inhibition against the passage of a 'law retrospective in its operation.'

"In the case of *Reed* v. *Swan,* 133 Mo. 100, l. c. 108, 34 S. W. 483, 484, Gant, P. J., speaking for the court, quoted with approval Mr. Justice Story's definition of a retrospective law as follows:

"'Every statute which takes away or impairs vested rights acquired under existing laws, *or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,* must be deemed retrospective.' (Italics ours).

"To the same effect are the following decisions: *Leete* v. *State Bank,* 115 Mo. 184, loc. cit. 198, 21 S. W. 788; *Bartlett* v. *Ball,* 142 Mo. 28, loc. cit. 36, 43 S. W. 783; *Bartlett* v. *Tinsley,* 175 Mo. 319, loc. cit. 332, 75 S. W. 143; *Rueckling Const. Co.* v. *Withnell,* 269 Mo. 546, loc. cit. 558, 191 S. W. 685.

"Applying the above definition to so much of the amendment of 1919, as undertook to assess an additional 1 per cent upon that portion of the net

income for the calendar year of 1919, which was received by appellant prior to the going into effect of said amendment, we are clearly of the opinion that it 'did create a new obligation or impose a new duty' in regard thereto, and that the amendment does to that extent operate retrospectively, and is in violation of the above-mentioned constitutional inhibition against retrospective laws. It would be difficult to reach any other conclusion while looking the Constitution squarely in the face.

"* * * It is a well-settled rule of law that, absent an express constitutional inhibition to the contrary, the General Assembly of a state or the Congress of the United States may pass a retrospective law, provided the law so passed does not violate some other constitutional provision. *Cooley's Constitutional Limitations* (7th Ed.) 529; 12 *C. J.* 1085. But when the Constitution expressly prohibits such a law as is the situation with which we are now dealing, quite a different situation is presented, and those authorities dealing with legislative action passed by legislative bodies not thus limited serve no useful purpose in the solution of the problem now presented."

See also *Graham Paper Co.* v. *Gehner,* 332 Mo. 155, 59 S. W. (2d) 49 and *State ex rel. Koeln* v. *S. W. Bell Telephone Co.,* 316 Mo. 1008, 292 S. W. 1037.

We therefore submit that under the Missouri Constitution and the decided cases by its Supreme Court, there was no error in holding that the claimant could not recover contributions for the period prior to the effective date of the Missouri Act.

Petitioners argue (Brief p. 20-25) that the Respondent herein alleging the unconstitutionality of a statute, must show beyond cavil that the statute in its operation injures the estate of which he is Trustee; and, that, if Respondent is not required to pay Petitioners the amount in contro-

versy, in any event, the same would have to be paid the Federal Government under Title IX of the Federal Social Security Act. The error in the assertion is patent.

The cases relied upon by Petitioner, such as *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 374, have no application to the facts here presented. An analysis of the several citations contained in Petitioners' brief (p. 20-25) discloses that they, in varying verbiage, merely hold that one attacking a statute as unconstitutional, must show that "he has sustained or is immediately in danger of sustaining *some direct injury* as the result of its enforcement.

In the instant case, the record Exhibit "G" (Tr. 19-20) discloses that the Federal Collector of Internal Revenue filed a claim against the estate for the full two per cent of the wages paid by the bankrupt during the calendar year 1937, to-wit, for $1,247.81, due under Title IX of the Federal Social Security Act. These wages were paid by the bankrupt operating under owner-management during the entire year 1937 (Tr. 2). In any event, the claims of the Federal Collector were adjudicated by the Referee as is provided in *Section 64 of the Chandler Act* (11 *U. S. C. A.* 1939, *Pocket Parts, p.* 16). That Section provides that "in case any question arises as to the amount or legality of any tax, such question shall be heard and determined by the court." The Referee made an order thereon (Exhibit "H," Tr. 21), the material part of which is as follows:

> "Now on this 28 day of February, 1939, there coming on for consideration the claims of Dan M. Nee, Collector of Internal Revenue, filed herein in the following amounts: $397.26; $34.75; $107.12; $1520.29.

"After duly examining and considering said claims:

"It Is Ordered that all of the above claims, and any and all claims of the United States against this Estate, be and the same hereby are allowed in the total sum of $564.58, and the Trustee herein is directed to issue his check in payment."

No petition for review or appeal was taken from the above order of the Referee to the claims of the Federal Government with respect to the Federal Social Security Act, and the amount allowed was promptly paid by the Respondent (Tr. 4-5). Thus, the estate's liability to the Federal government has been fully adjudicated and terminated.

Petitioners herein cannot collaterally attack that final, binding and subsisting judgment. See *Oriel* v. *Russell*, 278 U. S. 358, 49 S. Ct. 173, 73 L. Ed. 419.

If the bankrupt estate is now required to pay the additional $530.09 to Petitioners, covering contributions on wages paid from January 1st, 1937 to June 17th, 1937, the effective date of the Act, the estate would be thereby injured and damaged to that extent.

Therefore, Respondent insistently maintains that, being injured by the attempted retrospective operation of the statute, he is at liberty to strike it down as infringing the Constitutional rights of those for whom he is Trustee.

(b) There was no error in not giving effect to Sec. 6 (C) (d) of the Missouri Unemployment Compensation Act.

Petitioners' Point II argues that if Section 6 (A) of the Missouri Act is retrospective, then Section 6 (C) (d) should be applied to obtain the same result. This amaze-

ing theory ignores the fact that this latter Section so construed would be subject to the same objection—it would be retrospective in its operation and reach back to a time prior to the Act's effective date. The argument that it levies a "tax" in addition to any tax under Section 6 (A) has two fallacies, (1) it is for the same purposes as the contributions under Section 6 (A), which we hereafter show is not a proper subject for taxation under the constitution and laws of Missouri; and (2) *Section* 3, *Article* X of the *Missouri Constitution* requires taxes to be uniform on the same class of taxpayers in the state. To use an outside standard, such as Section 6 (C) (d) to attempt to levy an additional tax on certain members of a class who do not pay under the rate established in the Missouri law enough to meet that standard, would violate this section of the constitution.

(c) No interest was allowable on Petitioners' claim.

The entire claim for contributions admittedly arose subsequent to the filing of the bankruptcy proceeding, and during the period of "owner management." Appellants urge that Section 15 (a) of the Missouri Act provides for the allowance of interest upon the several amounts from their due date to the date of payment at one per cent per month. They next make the ingenuous argument that Section 57 (j) of the Bankruptcy Act makes provision for the payment of this interest. In this they are in error because said provision has been held to apply solely to debts existing at the time of filing of the petition in Bankruptcy. See *Boteler* v. *Ingels,* 84 L. Ed. 20 "Adv. Opinions."

The contributions are not taxes, but constitute a mere civil debt. Petitioners cannot, therefore, claim any solace in *Section* 124 (a), *Title* 28, *U. S. C. A.* (Act of

June 18th, 1934), as that provision merely requires those enumerated therein, including bankruptcy trustees conducting a business "shall be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

Interest even on unpaid taxes, to be recoverable in bankruptcy, must be at a rate such as is generally fixed as compensation for the use of money by a private agent, as penalties are not collectible in bankruptcy. *New York* v. *Jersawit,* 263 U. S. 493, 68 L. Ed. 405; *In re Beardsley and Wolcott Mfg. Co.,* 82 Fed. (2d) 239, 104 A. L. R. 881. The fact that the amount imposed for non-payment of taxes is called "interest" in the taxing statute is not conclusive of its character in bankruptcy. *Re Ashland, etc. Co.,* 229 Fed. 829.

But aside from all these considerations, there can be no interest allowed in this case. The debtor's general creditors have allowed claims in excess of $100,000.00, and will never be paid a cent. Even the debts created by the bankrupt while under the Court's supervision through "owner-management," and temporary Trustee cannot be fully paid as to the allowed principal. Under such circumstances, interest is never allowable.

This Court, in *Thomas* v. *Western Car Co.,* 149 U. S. 95, 37 L. Ed. 663, following the rule in most state courts, laid down the definite rule that interest is not allowed against funds in the hands of the Court representatives from the time of their initial appointment. It was there said that the basis of the rule lies in the fact that the delay in distribution is the act of the law, and is a necessary incident to the settlement of the estate.

Interest will never be computed and allowed against the estate of the bankrupt or insolvent, where the assets

are insufficient to pay the principal of the debts. *American Iron Co.* v. *Seaboard Co.*, 233 U. S. 261, 58 L. Ed. 949; see also 39 A. L. R. l. c. 458.

There was, therefore, no error in disallowing interest.

***(d) Contributions for unemployment compensation payable under the Missouri statute are not taxes. There was no error in refusing to determine whether or not contributions under the Missouri Act were taxes, since by the allowance of petitioners' claim as an administrative expense it was accorded a higher rating of priority than that claimed for it under Section 64 (a) (4).* See Sec. 4 (a) (1) 11 U. S. C. A. 104 (a) (1).**

(1) SUCH CONTRIBUTIONS DO NO COME WITHIN THE CONSTITUTIONAL PROVISION WITH REFERENCE TO TAXES.

The taxing power of the Missouri General Assembly is limited by *Sec.* 3, *Art. X* of the *Constitution of Missouri* (Mo. Stat. Ann. Vol. 15, page 733) which provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law."

The language of the trial court in its memorandum opinion (R. 25) aptly disposes of the contention that the Missouri Unemployment Compensation Act provides for the collection of a tax, in these words:

> "A very casual reading of the Missouri statute reveals that it is not a tax levied and collected within the purview of said Section 3."

The Missouri Act (*Laws of Missouri,* 1937, pp. 574-603 incl.) purports to be a full and comprehensive code in itself. Sections 8, 9, 10 and 11 of the Act (Laws of Missouri 1937, pp. 588-594) provide that *benefits* out of said fund shall be paid only to the eligible unemployed individuals therein enumerated, and not otherwise.

Section 12 (a) of said Act (*Laws of Missouri,* 1937, p. 595) provides:

> "*There is hereby established as a special fund, separate and apart from all public moneys or funds of this state,* an unemployment compensation fund, which shall be administered by the commission exclusively for the purpose of this Act. * * *"

The leading case interpreting the constitutional provisions with reference to taxes is *State ex rel Garth* v. *Switzler, Judge,* 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653. In that case the Act under consideration attempted to levy a collateral succession tax on all property conveyed by will or by death of an intestate to any person outside of an enumerated class. The Act provided that the tax, when collected, should be placed in the State University Scholarship Fund to create a fund for maintaining free scholarships in the University to be distributed throughout the state on competitive examinations to applicants without means. The opinion of the court, holding the Act not within the constitutional taxing powers of the Missouri General Assembly, is an exhaustive treatise and detailed analysis of the constitutional provision. The court's construction of that provision is as follows:

> "We construe Section 3 of Article 10 of our constitution as a direct inhibition upon the general as-

sembly to levy a tax for a private purpose, or for the benefit of any private individual. The language used is not susceptible of any other construction. We shall assume without further comment that, if the act under review authorizes the levy of a tax, that tax must be for a public purpose; otherwise, it is a direct violation of the constitution of this state. * * *

* * * * * *

"In *Loan Association* v. *Topeka,* 20 Wall 655, a statute of the state of Kansas which authorized a town to issue its bonds in aid of the manufacturing enterprise of private individuals came before the supreme court of the United States; and it was held void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profits of others, and not for a public use, in the proper sense of these words.

"In *Allen* v. *Jay,* 60 Me. 124, a town, at a meeting legally called, voted to loan its credit to a firm to the amount of $10,000, and issue its bonds for that sum, provided the firm would invest $12,000 to $13,000 in a steam sawmill, with a run of stone to grind meal, and maintain it for ten years; and the legislature afterwards passed an enabling act authorizing said loan, but the supreme judicial court held the act unconstitutional and void because not for a public use.

"All the buildings on a very large portion of the City of Charleston, S. C., having been destroyed by fire, the city council passed an ordinance providing for the issue of bonds by the city to be loaned the owners, to build and rebuild the waste places and burnt districts. The legislature afterwards, by an act reciting the ordinance, fully confirmed and authorized the issue of said bonds, known as 'Fire

Loan Bonds,' and certain persons bought them. Afterwards suit was brought against the city to collect them but the supreme court of the state held said bonds were issued for a private purpose, and void. That the taxing power could only be exercised for some public purpose. *Feldman* v. *City of Charleston,* 23 S. C. 57.

"In November, 1872, a great conflagration swept over a large portion of the city of Boston. The legislature of Massachusetts passed an act authorizing the city of Boston to issue bonds, and loan the proceeds on mortgage to the owners of the land, to enable them to rebuild their houses. The supreme court held the act void; that it was not for a public object, in a legal sense. *Lowell* v. *City of Boston,* 111 Mass. 454.

"In *Curtis's Administrator* v. *Whipple,* 24 Wis. 350, the legislature empowered the town of Jefferson to raise a sum by taxation to be paid to the treasurer of the Jefferson Liberal Institute, a private educational institution, but the supreme court held the act void, the tax being for a private purpose; and a like conclusion was reached in *Jenkins* v. *Inhabitants of Andover,* 103 Mass. 94.

"This court, in *Deal* v. *Mississippi Co.,* 107 Mo. 464, 18 S. W. 24, held Sec. 5697 Rev. St. 1879, void, because it gave a bounty to private individuals for growing forest trees upon their own lands.

"In each and all of these cases it was held that the fact that the public might be incidentally benefited by rebuilding a burnt city, the establishment of manufactories and schools, would not sustain the tax Every factory, every private school or academy, every industrial enterprise which furnishes opportunity for labor and the earning of wages, benefits a community in one sense; but the indirect good which inures in this way furnished no basis for taxation of other business to build up such occupations."

The Missouri Act does not provide for these contributions to be used for public purposes, but rather, provides for contributions which, in reality, constitute an assessment against a class for the benefit of a class, and hence, it does not come within the purview of a constitutional tax. This is well pointed out *In re Farrell*, 211 Fed. 212 (D. C. Wash.) wherein the Trustee objected to the allowance as a tax of a claim filed by the Industrial Insurance Department of the State of Washington. The claim represented assessments made by the State Industrial Department against the bankrupt based upon its payroll of workmen engaged in extra-hazardous employment. The objection was upon the ground that the claim was not a tax. The court held that the order of the Referee allowing priority to the claim was erroneous and ordered the same allowed only as a general claim. In so doing, it said:

> "A 'tax' is defined as a pecuniary burden imposed for the support of the government. *United States* v. *Railroad*, 17 Wall. 322, 326, 21 L. Ed. 597. It is the enforced proportionate contribution of persons and property levied for the support of government and for all public things. *Opinion of Justices*, 58 Me. 591; *Cooley on Taxation*, 1; *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, 19 L. Ed. 95; *Springer* v. *United States*, 102 U. S. 586, 26 L. Ed. 253.
>
> "'A "tax" is a pecuniary burden laid upon individuals and property for the purpose of supporting the Government.' *New Jersey* v. *Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284.
>
> "The assesment in issue is not to relieve the general taxpayer, but rather to relieve the employer from liability for injuries sustained by employees in extra-hazardous employments and to compensate such employees. It is an assessment against a class for the benefit of a class.

"The Supreme Court of Washington, in *State ex rel Davis-Smith Co.* v. *Clausen,* 65 Wash. 156, at page 203, 117 Pac. 1101, at page 1116 [37 L. R. A. (N. S.) 466], in passing upon the constitutionality of the Industrial Insurance Act, and considering it with relation to Article 7 of the State Constitution, says:

> "'It is manifest that it is not a tax in the sense the word is used in the sections of the Constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of the government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employment. It is the consideration which the owners of the industries pay for the privilege of carrying them on.'

"It is manifest from a reading of Section 64 of the Bankruptcy Act which was passed prior to the passage of the Industrial Insurance Act of Washington, that Congress intended to include within said section only such taxes as were required to be paid into a common fund for the support of the government, national, state or municipal, and such a fund which would relieve the general tax payer from a payment of an unfair proportion of the expenses in the operation of the government, or a tax which would be by operation of law a lien upon property of the bankrupt estate."

The Farrell case quite well evidences what here appears. The Missouri Act seeks to assess a class, to-wit, employers, for the benefit of a class, to-wit, certain eligible employees, when and if they later become unemployed. The fund is segregated from public moneys and

is no accession from the public revenue, nor is it to be used for the payment of any current public expenses.

In the case of *In re Mosby Coal & Mining Co.*, 24 Fed. Supp. 1022, it was held by Judge Reeves, from whom this appeal is taken, that the claimant Drisler, in his official capacity, was not entitled to any lien for unpaid contributions under the Unemployment Compensation Act, and that such contributions were not taxes within the meaning of the Missouri Statutes creating a lien against the assets of corporations for unpaid taxes.

Other Missouri cases interpreting the constitutional prohibition aforesaid are:

In *Deal* v. *Mississippi County* 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622, the Missouri Supreme Court held that a statute providing that persons planting prairie land with forest trees and cultivating the same for three years shall receive a bounty thereafter for fifteen years from the County, contravened the aforesaid Constitutional provision.

In *Simmons Medicine Co.* v. *Ziegerheim,* 145 Mo. 368, 47 S. W. 10, the Missouri Supreme Court declared invalid as violating the aforesaid constitutional provisions a statute providing that every manufacturer of patent medicine shall pay a license which shall be turned into a fund for maintenance of free scholarships for students without means.

In *Ranney* v. *Cape Girardeau,* 255 Mo. 514, l. c. 518, 164 S. W. 582, l. c. 584, the Missouri Supreme Court distinguished between a tax under the Constitution and special assessments. "Such are," said the Court, "in a broad sense, referable to the taxing power." But they "are not taxes for public purposes or taxes at all within the purview and the sense of the Constitutional provi-

sion invoked or within the sense and purview of other sections of the article on revenue and taxation."

The cases cited in Petitioners' brief are not applicable, and are in no way controlling in the instant case. Petitioners argue that a tax by any other name is still a tax, and cite cases so holding. Respondent has no quarrel with this assertion, but maintains that before one may argue that a tax by any other name is still a tax, it must conform to the constitutional provisions with respect to taxation in the particular state where it is attempted to be levied. That an assessment called a "contribution" in some other state has been determined to be a tax in that state is of no binding force or effect in this state, wherein there is a constitutional requirement within which a levy must fall if it is to be construed to be a tax. Whether or not an Act provides for a tax is a matter that must be determined in accordance with the constitution and laws of the state wherein the same is levied. This is the holding of the Supreme Court of the United States in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245, l. c. 1252, wherein Mr. Justice Stone, speaking of the Alabama Act and of the decision of the Alabama Supreme Court in the case of Beeland Wholesale Co. vs. Kaufman, said:

> "The Supreme Court held that the contributions which the statute exacts of employers are excise taxes laid in conformity to the Constitution and laws of the state. * * * Its validity under the Federal Constitution is to be determined in the light of Constitutional principles applicable to state taxation."

We insistently maintain that the contributions provided for in the Missouri Unemployment Compensation

Act are not taxes within the meaning of the Missouri Constitution.

(2) CONTRIBUTIONS ARE NOT CONSIDERED TAXES BY THE MISSOURI ACT.

Section 12 (a) provides that all moneys collected shall be placed in a separate fund to be administered by the Commission exclusively, which fund is a *"special fund, separate and apart from all public moneys or funds of this state."*

Section 15 of the Act provides that if any employer defaults in the payment of any contributions, the amount thereof shall be collected by civil action in the name of the Commission (*Laws of Missouri,* 1937, *Section* 15 (b), page 599).

Subdivision (c) of Section 15 is as follows (italics ours):

> "In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims *except taxes and claims for wages* of not more than $500.00 to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extention proposal or composition, under the Federal Bankruptcy Act of 1898, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in Section 64 (b) of that Act [*U. S. C. Title XI, Sec.* 104 (b)] as amended."

Subdivision (c) of the 1937 Act was omitted in the 1939 amendment (*Laws of Missouri,* 1939, Page 924).

Nowhere in the Missouri Act are the contributions referred to as "taxes." In the quoted subdivisions of Section 15, the contributions are expressly treated as something other than taxes. The contributions were not made a lien on any property of the employer by the 1937 Act. In the event of default, absent bankruptcy or court receivership, their payment could be enforced only by an ordinary civil action.

It would seem clear that the Legislature did not intend to give the contributions mentioned in the Act the force of a tax. It especially distinguished them from taxes when it said that under certain circumstances the contributions "shall be paid in full prior to all other claims except taxes and claims for wages of not more than $500.00 to each claimant earned within six months of the commencement of the proceeding."

It is therefore apparent, by the terms of the Act itself, that the Missouri Legislature, having in mind Sec. 3, Art. X, Missouri Constitution, did not consider or intend to consider claims for contributions to be claims for taxes.

(3) IT IS NOT NECESSARY IN THIS PROCEEDING TO DETERMINE WHETHER OR NOT THE CONTRIBUTIONS UNDER THE MISSOURI ACT ARE TAXES.

The Circuit Court did not err in finding it unnecessary to determine whether or not the contributions under the Missouri Act were taxes. The claim having been allowed as an administrative expense, it was accorded a higher rating of priority than that claimed for it by petitioners. We fully adopt what was said by Judge Thomas in the opinion (Tr. 35-37) with respect to that subject.

We earnestly insist that no right to the writ of certiorari has been shown, and it should be denied.

Respectfully submitted,
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